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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 91

UNITED STATES, APPELLANT,

vs.

ROY FRUEHAUF, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 16, 1960

PROBABLE JURISDICTION NOTED OCTOBER 10, 1960

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Criminal Docket

UNITED STATES DISTRICT COURT

Cr. 159-138

THE UNITED STATES

vs.

ROY FRUEHAUF (Ct. 1), FRUEHAUF TRAILER CO. (Ct. 1), BURGE SEYMOUR (Ct. 1), ASSOCIATED TRANSPORT, INC. (Ct. 1), BROWN EQUIPMENT AND MANUFACTURING CO. (Ct. 1), DAVE BECK (Ct. 2)

T. 29, Sec. 186(a)(d) & T. 18, Sec. 2, U.S.C.

Employers of employees engaged in an industry affecting commerce, unlawfully paying money to the President of the Union representing said employees (Count 1)

T. 29, Sec. 186(b)(d) U.S.C.—President, Int'l Bro. of Teamsters, etc., unlawfully receiving and accepting money from employers of employees engaged in an industry affecting commerce (Count 2).

(Total—Two Counts).

Statistical Record.
Costs.
Clerk.
Marshal.
Docket fee.

J.S. 2 mailed
J.S. 3 mailed—All.
Violation ——.

Docket Entries

Date	Proceedings

6-17-59. Filed Indictment.

7-1-59. Warrant of arrest ordered for Dave Beck. Noonan, J.

7-1-59. Filed notice of appearance by Mortimer Allen Sullivan, Esq. Wallridge Building, Buffalo, New York, as to deft Associated Transport, Inc.

7-1-59. Filed notice of appearance by Robert C. McCreedy, Esq., 233 Bway, N.Y. as to deft Brown Equipment & Manufacturing Co.

7-1-59. Filed notice of appearance by Simpson, Thacher & Bartlett, Esqs. 120 Bway, N.Y. as to deft Burge Seymour.

7-2-59. Roy Fruehauf—Pleads Not Guilty—Bail fixed at $2,500. Paroled until 4 P.M. to give bail.

7-2-59. Fruehauf Trailer Co.—Pleads Not Guilty by Roy Fruehauf, President.

7-2-59. Burge Seymour—Pleads Not Guilty—Released on own recognizance.

7-2-59. Associated Transport, Inc.—Pleads Not Guilty by David Scheckter, Vice-President.

7-2-59. Brown Equipment & Mfg. Co.—Pleads Not Guilty by C. W. Vale, Treasurer.

[fol. 2] 7-2-59. Dave Beck appears in court with counsel and warrant of arrest is vacated. Defendant Pleads Not Guilty—Bail fixed at $2,500:—Paroled until 4 P.M. to give bail.

Charles Burdell, Esq., of Seattle, Washington allowed to appear for Defendant Beck in this case.

Individual defendants ordered fingerprinted. Motions to be made returnable by 8-12-59. Noonan, J.

7-2-59. Filed notice of appearance by Charles Seligson, Esq. 350 Fifth Ave. NYC as to deft Fruehauf Trailer Co.

7-2-59. Filed notice of appearance by Phillips, Nizer, Benjamin, Krim & Ballon Esqs., by Louis Nizer for Defendant Roy Fruehauf. (1501 Broadway, NYC.)

7-2-59. Filed notice of appearance by James D. Walsh, Esq., 347 Madison Ave., N.Y. 17, N.Y., by Charles Burdell, Esq., for Defendant Dave Beck.

7-2-59. Dave Beck—Filed Consents & Order extending the bail limits of the defendant to include the State of Washington. Noonan, J.

DOCKET ENTRIES

Date	Proceedings

7-2-59. Roy Fruehauf—Filed Consents & Order extending the bail limits of the defendant to include the states of Michigan, Indiana, Illinois and Ohio. Noonan, J.

8-12-59. Roy Fruehauf—Filed order enlarging the bail limits in the prior order of this court per Judge Noonan, dated July 2, 1959 hereby are extended to include the State of California. Herlands, J.

8-12-59. Filed original notice of appearance on 7-1-59. All notices, papers etc. to be mailed to my N.Y. Office in % Associated Transport, Inc. 380 Madison Ave. N.Y.

Sep. 1, 1959. Filed Transcript of record of proceedings, dated 7/2/59.

Sep. 3, 1959. Filed Transcript of record of proceedings, dated 8-12-59.

10-9-59. Roy Fruehauf—Filed affidavit and notice of application for enlargement of bail limits.

10-9-59. Roy Fruehauf—Filed order & the consent by Nat'l Surety Corp. that the bail limits of the def't are extended to include Killarney, Ontario the two-day period of Oct. 10 & 11 of 1959. Edelstein, J.

1-11-60. Roy Fruehauf—Filed Notice of application to assign case for trial.

1-29-60. Filed Memo Endorsed on Motion Papers filed 1-11-60—"Motion granted to the extent of fixing Feb. 23, 1960 as a trial date and referring trial to Judge A. J. Connor." Weinfeld, J.

Notices Mailed.

Feb. 4, 1960. Filed Transcript of record of proceedings, dated 1-25-60.

Feb. 8, 1960. Filed Transcript of record of proceedings, dated 10-21-59.

[fol. 3] 2-9-60. Docketed Order to Show Cause and Affidavits, filed 2-5-60, why the trial, now set for 2-23-60, before Aloysius J. Connor, U.S.D.J., should not be deferred, etc.—Memorandum endorsed: Motion Granted to the extent of setting the case down for trial before Judge Sugarman on 2-18-60, at 10:30 A.M. Weinfeld, J.

2-10-60. Filed Transcript of record of proceedings, dated 1-29-60.

DOCKET ENTRIES

Date	Proceedings
	2-18-60. Hearing begun before Sugarman, J.
	Deft. Roy Fruehauf—motion to dismiss granted.
	Deft. Fruehauf Trailer Co.—motion to dismiss granted.
	Deft. Burge Seymour—motion to dismiss granted.
	Deft. Associated Transport, Inc.—motion to dismiss granted.
	Deft. Brown Equipment & Manufacturing Co.—motion to dismiss granted.
	Deft. Dave Beck's motion to dismiss granted.
	Bail cont'd as to Deft. Roy Fruehauf & Deft. Dave Beck, Sugarman, J.
	3-7-60. Dave Beck—Filed recognizance after indictment (Cash Bail), dated 7-2-59—$2,500.—Dave Beck, Principal & Surety.
	3-7-60. Roy Fruehauf—Filed recognizance after indictment, dated 7-2-59—$2,500. National Surety Corp.
	3-10-60. Filed Transcript of record of proceedings, dated 2-18-60.
	3-18-60. Filed Notice of Appeal to the Supreme Court of the United States, of the U.S.A., from the order entered 2-18-60, dismissing the indictment. (Appeal taken pursuant to 18 U.S.C. 3731) & request to Clerk to prepare a transcript of the record for transmission to the Clerk of the Supreme Court of the U.S.
	3-23-60. Roy Fruehauf—Filed Affidavit and Notice of Motion to release def't on his own recognizance, permitting him free movement without restriction and discharging the National Surety Corp. from its liability in connection with the bail bond.
	3-25-60. Dave Beck—Filed Affidavit & Notice of Motion-releasing the deft on his own recognizance permitting the free movement of the deft. without restriction; and directing the Clerk of the Court to pay out of the Registry of the Court, to Dave Beck, the person who deposited it, the sum of $2,500. less the Clerk's fees, if any.
	3-28-60. Roy Fruehauf—Filed Memo Endorsed on Motion Papers filed 3-25-60—"Application Granted. The Gov't consents to the deft's release on his own recognizance. Submit Order. Notice Mailed. Cashin, J.

DOCKET ENTRIES

Date Proceedings

4-1-60. Roy Fruehauf—Filed Order releasing def't on his own recognizance, permitting him free movement without restriction and discharging the National Surety Corp. from its liability as surety in connection with the bail bond posted by it in behalf of deft't. Cashin, J.

[fol. 4] 4-11-60. Dave Beck—Filed Order releasing def't on his own recognizance, permitting him free movement without restriction and that the Clerk of the Court pay out of the Registry to Dave Beck, the sum of $2,500, less the Clerk's fees, if any. Cashin, J.

4-15-60—Filed Affidavit & Order directing the Clerk to transmit to the Clerk of the Supreme Court of the United States all original papers specified in the notice of appeal of the U.S.A. & that they be returned to this Court upon the conclusion of this appeal. Metzner, J.

[fol. 5] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

INDICTMENT AND ENDORSEMENTS

The Grand Jury charges:

On or about the 21st day of June, 1954, in the Southern District of New York, Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associated Transport, Inc. and Brown Equipment and Manufacturing Co., defendants, employers of employees who were engaged in an industry affecting commerce, did lawfully, wilfully and knowingly pay and deliver and agree to pay and deliver to Dave Beck, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a representative of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000.

[Title 29, United States Code, Section 186(a)(d) and Title 18, United States Code, Section 2.]

Count Two

The Grand Jury further charges:

On or about the 21st day of June, 1954, in the Southern District of New York, Dave Beck, defendant, a representative of employees who were engaged in an industry affecting commerce, to wit, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associ-
[fol. 6] ated Transport, Inc. and Brown Equipment and Manufacturing Co., employers of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000.

[Title 29, United States Code, Section 186(b)(d)]

Harry J. Cobb, Jr., Foreman.

/s/ S. Hazard Gillespie, Jr., United States Attorney.

[fol. 7] [Endorsed:] Cr 159-138 U. S. District Court. The United States of America vs. Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associated Transport, Inc., Brown Equipment and Manufacturing Co. and Dave Beck, Defendants. Indictment. Violations: Title 29, U.S.C., § 186(b)(d) and Title 18, U.S.C., § 2. S. Hazard Gillespie, Jr., United States Attorney. A true bill. Harry J. Cobb, Jr., Foreman. Filed U. S. District Court S. D. of N. Y. June 17, 1959.

July 1—1959.

Warrant of arrest ordered for Dave Beck, Noonan J.

July 2—1959.

Roy Fruehauf Pleads not guilty—Bail fixed at $2500. Paroled until 4 p.m. to give bail.

Fruehauf Trailer Co. Pleads not guilty—by Roy Fruehauf—President.

Burge Seymour Pleads not guilty—Released on own recognizance.

Associated Transport, Inc. Pleads not guilty—by David Schecktér, V.P.

Brown Equipment & Mfg. Co. Pleads not guilty—by C. W. Vale, Treasurer.

Dave Beck appears in Court with Counsel and warrant of arrest is vacated. Deft. Pleads not guilty—Bail fixed $2500.

Charles Burdell, Esq of Seattle, Wash. allowed to appear for deft. Beck in this case—Deft. Paroled until 4 p.m. to give bail.

Individual defendants ordered fingerprinted.

Motions to be made returnable by 8/12/59; Noonan J.

[fol. 7a] February 18, 1960.

Case called before Sugarman J. Hearing begun.

Deft. Fruehauf motions to dismiss—Granted.

Deft. Fruehauf Trailer Co. motions to dismiss—Granted.

Deft. Burge Seymour motions to dismiss—Granted.

Deft. Associated Transport Inc. motions to dismiss—Granted.

Deft. Brown Equipment & Mfg. Co. motions to dismiss—Granted.

Deft. Beck's motions to dismiss—Granted.

Bail cont'd as to Both Defendants, Sugarman J.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Cr. 159-138

UNITED STATES OF AMERICA,

vs.

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO. AND DAVE BECK, Defendants.

Stenographer's Minutes of February 18, 1960

Before: Hon. Sidney Sugerman, District Judge

New York, 10:30 o'clock a.m.

APPEARANCES:

S. Hazard Gillespie, Jr., Esq., United States Attorney, for the Government; By John A. Guzzetta, Esq., and Edward Brodsky, Esq., Assistant United States Attorneys.

Phillips, Nizer, Benjamin, Krim & Ballon, Esqs., Attorneys for Defendant Roy Fruehauf; Louis Nizer, Esq., of [fol. 9] Counsel. Charles Seligson, Esqs., and Albert I. Schmaulholz, Esq., Attorneys for Defendant Fruehauf Trailer Co.

Simpson, Thacher & Barlett, Esqs., Attorneys for Defendant Burge Seymour; Cyrus R. Vance, Esq., and Edward Weisl, Jr., Esq., of Counsel.

Mortimer Allan Sullivan, Esq., Attorney for Defendant Associated Transport, Inc.

Robert C. McCreedy, Esq., Attorney for Defendant Brown Equipment and Manufacturing Co.

James D. Walsh, Esq., Attorney for Defendant Dave Beck; Charles Burdell, Esq., of Counsel.

[fol. 10] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: There are some preliminary matters I wish to conclude which were not resolved at our pretrial conference before we actually get into the work of the case.

I want to be perfectly sure that there is actual representation on behalf of each defendant.

Mr. Louis Nizer represents Roy Fruehauf?

Mr. Nizer: Yes, your Honor.

The Court: Charles Seligson represents the Fruehauf Trailer Company.

Mr. Seligson: Yes, your Honor.

The Court: Who is of counsel to Simpson, Thacher & Bartlett in representing the defentant Seymour?

Mr. Vance: I am, your Honor.

The Court: Now who appears for Associated Transport?

Mr. Sullivan: I do, your Honor, Mortimer Sullivan.

The Court: Mr. McCreedy represents Brown Equipment?

Mr. Sullivan: He has been delayed and I will speak for him until he gets here.

The Court: Who represents the defendant Beck?

Mr. Burdell: I do, your Honor. I am Charles Burdell. [fol. 11] I was admitted specially in this Court at the time of the arraignment. I am not sure that it was for the entire purpose of the case——

The Court: Well, is there any objection by the government?

Mr. Guzzetta: Absolutely none, your Honor.

The Court: Now, I have received trial memoranda from the government, an original and supplemental memorandum from the defendant Roy Fruehauf, a memorandum from Fruehauf Trailer, a memorandum on behalf of—is that pronounced Burge Seymour?

Mr. Vance: Yes, your Honor.

The Court: On behalf of Burge Seymour.

Now, does any other defendant wish to submit a trial memorandum?

Mr. Burdell: I have a trial memorandum prepared, your Honor, which I can provide to you this morning, except that there are two pages which need to be stapled to the end of it, and I thought that during the recess——

The Court: We will take care of that. May I have it, please?

Mr. Burdell: Yes (handing to Court).

[fol. 12] The Court: I should like to inquire if the defendants are present, all the individual defendants. Is Roy Fruehauf present?

Mr. Nizer: Yes, sir.

The Court: Is Burge Seymour present?

The Defendant Seymour: Yes, sir.

The Court: Is Dave Beck present?

The Defendant Beck: Yes, sir.

The Court: Now, from a reading of the trial memoranda which were available I got the notion that at least some of the defendants intend to move to dismiss the indictment. As I understand the rules, the Federal Rules of Criminal Procedure, Rule 12, that motion should be made now.

Does any defendant wish to be heard on a motion to dismiss the indictment?

Mr. Nizer: Well, your Honor, I thought we would be in a better position to address ourselves to the grounds for a dismissal after the government had made an opening here, but if on inquiry in this pretrial, preliminary conference, the government conceded certain positions that it has conceded at arraignment and other places in the minutes—to make it without some background which is the basis for some of the motions might leave the situa-[fol. 13] tion in a position where your Honor would have a series of arguments without foundation. For example, the loan: I have here the minutes of the arraignment, the comments made by Mr. Hazard Gillespie in which he was speaking for the government——

The Court: Well, Mr. Nizer, of course, you don't have the advantage of the government's trial memorandum because I think it was the choice of the defendant—I don't know whether the government joined in that—not to exchange trial memoranda.

Mr. Guzzetta: I acceded to that, your Honor; I didn't join.

Reading of Excerpts from Government's Trial Memorandum

The Court: Well, to the extent that you don't know the government's position, at least on the matter of the loan, I will read now into the record what I consider to be a judicial admission by the government from its brief.

> "This memorandum is submitted for the purpose of supplying the Court with a general outline and

analysis of the facts the government intends to prove together with an exposition of the statutory and decisional law regarding the crime charged in the instant case."

I then omit the first paragraph of the portion of the brief headed "Background And Statement of Facts In- [fol. 14] tended to be Proved," which deals with the indictment, and proceed with the following, which begins a quote:

"The facts which support the charge and which the government intends to prove are as follows:

"In about the middle of 1954 Dave Beck, at that time president of the International Brotherhood of Teamsters, asked Roy Fruehauf to lend him $200,000. Subsequently, the loan was discussed at a meeting held in Fruehauf's Detroit office attended by Fruehauf, Alfons B. Landa, an attorney for the Fruehauf Trailer Co. and one of its directors, and Simon Wampold, attorney for Dave Beck. Landa thereafter contacted the officers of various banks in an unsuccessful attempt to place the loan. Finally, Fruehauf and Burge Seymour found it necessary to arrange the loan without the aid of financial institutions and, instead, processed it through the Fruehauf Trailer Co. (Roy Fruehauf, president), Associated Transport Co. (Burge Seymour, president), and the latter's wholly owned subsidiary Brown Equipment and Manufacturing Co. At the time Fruehauf Trailer Co., Associated, and Fruehauf and Seymour knew that Beck [fol. 15] was a representative of teamsters; indeed, by his own admission, Fruehauf considered Beck and the teamsters to be as one."

Mr. Guzzetta: Excuse me, your Honor. I think you left out a phrase inadvertently. At the time Fruehauf Trailer Company, Associated and Brown all employed"——

The Court: Oh, yes, I beg your pardon. "Brown all employed members of the Teamsters Union, and Fruehauf and Seymour knew that Beck was a representative of teamsters; indeed, by his own admission,

Fruehauf considered Beck and the teamsters to be as one.

"The method by which this otherwise simple transfer of $200,000.00 from Fruehauf to Beck was effected is a fairly complex one, apparently caused by difficulties encountered by the defendant employers in effectuating what they have called a 'loan' but without officers of their corporations learning of the transaction.

"The proof will demonstrate the details of this circuitous financing operations as follows.

"First, Roy Fruehauf contacted Burge Seymour and informed him of Beck's request for $200,000.00. [fol. 16] Neither Fruehalf nor Seymour wished to effect the loan by use of personal funds. To complicate matters further neither Fruehauf nor Seymour felt that their respective corporations could overtly finance the transfer of funds in such an amount without embarrassing themselves. It was determined therefore that Brown Equipment and Manufacturing Co., Associated's wholly-owned subsidiary, would actually make the transfer to Beck. The process involved in order to effectuate this transfer is perhaps best understood by a step-by-step delineation:

"1. By check dated June 21, 1954, $175,000.00 was transferred from the Fruehauf Trailer Co. to Brown. In return Fruehauf Trailer Co. received a $175,000.00 promissory note from Brown payable December 30, 1954, and purporting to bear interest in the amount of 5% per annum. (By defendants Fruehauf's and Seymour's admissions, no interest was ever paid to, or even anticipated by, Fruehauf or his corporation.)

"2. Brown, by four checks for $50,000.00 each, dated June 21, 1954, transferred $200,000.00 to Beck. In return it received Beck's promissory note dated June 18, [fol. 17] 1954, for $200,000.00 at 4% per annum, payable December 30, 1954. A Brown check requisition form states that the $200,000.00 is a temporary advance to the A.C.T. Committee (Independent Advisory Committee to the Trucking Industry). The reason given by defendant Seymour for listing the money to A.C.T.

is that by this means the people in Associated would not know that Beck was borrowing Associated funds.

"3. On June 21, 1954, Associated transferred $200,000.00 to Brown. One week later, on June 28, 1954, Brown returned to Associated $175,000.00 having then been lent that amount by Fruehauf Trailer Co. Later, on December 30, 1954, after Seymour had renegotiated the loan with Manufacturers Trust Co., Brown returned the remaining $25,000.00 to Associated. (It should be noted that Beck was supposed to, but did not, repay the 'loan' to Brown by December 30, 1954.)

"4. On December 27, 1954, Seymour borrowed $200,000.00 at 4% per annum for ninety days from the Manufacturers Trust Co. collateralizing this loan as follows:

"(a) The aforementioned promissory note from [fol. 18] Beck to Brown for $200,000.00, payable December 30, 1954;

"(b) A promissory note endorsed by Landa and Fruehauf to Seymour for $175,000.00 due March 8, 1955; and

"(c) A 'repurchase letter' dated March 8, 1955, signed by Seymour and Leon Greenbaum, his personal friend.

"The $200,000.00 was transferred by Seymour to Brown which, by checks for $85,000.00 and $90,000.00, transferred $175,000,000.00 to the Fruehauf Trailer Co. on December 26, 1954.

"5. Seymour paid interest to the Manufacturers Trust Co. totaling $2,066.66 and, by check dated March 30, 1955, returned the $200,000.00 loan to the bank.

[fol. 19] "6. That Beck paid the $200,000 loan from Brown by remitting to Seymour $163,215. on or about April 11, 1955, and $36,785. on or about June 30, 1955, which Seymour endorsed to Brown.

"7. Only $4,000 interest, approximately half of the interest due, was actually paid and that was remitted in the form of a check dated May 3, 1955, from Landa to Seymour."

Now, in my view that statement by the government is a judicial admission that the transaction was a loan. As a

matter of fact, to verify that belief, the government later argues in its brief that the use of the money was a thing of value. So at least, so far as I am concerned, there can be no dispute that the government's position is that this was a loan, and we are now resolved to the question of whether a loan under these circumstances was illegal under the statute before the amendment of 1959.

Now, Mr. Nizer, on the basis of the disclosure by the Court of what the Court understands to be a judicial admission by the government, do you wish to be heard on the preliminary application for a dismissal of the complaint, or do you wish to go to trial?

Mr. Nizer: No, sir, I would like to be heard on the mo-[fol. 20] tion, your Honor.

The Court: Very well.

Mr. Guzzetta, I see that you have arisen. What is your thought on the matter?

Mr. Guzzetta: Simply to communicate one thought to the Court that may not have been communicated by my brief.

The Court: Yes.

STATEMENT ON BEHALF OF UNITED STATES

Mr. Guzzetta: Despite the fact that there is the repeated use of the word "loan" in the government's advance outline before the Court, caused by the fact that the government's case in large part is as asserted by these defendants as the trial will reflect as it proceeds, nevertheless the government's position on the loan, and I hope to make this clear as the trial progresses, is actually twofold.

A loan, if your Honor please, is something that relates to a state of mind between the person who is receiving the money and the person who is giving the money, and again the repayment which actually occurred in this case is only one aspect of whether or not the transfer of funds between one party or from one party to another is actually a loan.

Now, to be quite specific, I will simply say that the position that the government takes is that the government has [fol. 21] called this a loan, and in reiterating the facts as we know them from the defendants, the defendants having repeatedly used the word "loan," we say that this is not necessarily so, because in fact any loan when it is made,

to prove the fact that it was a loan, goes through certain stages, and is accompanied by certain attributes and here those items were not present in this case.

For example, there was no collateral given by the recipient of this loan for $200,000. An additional item in connection with the loan, which I related in the brief, was that the loan could not be processed through financial institutions. It had to be effectuated and implemented by the defendants Fruehauf and Seymour through the corporations which they controlled. They could not get it elsewhere.

The facts will show further that although interest purportedly was to be paid in the intercorporate transaction, no interest attached to the loan, and, in fact, no interest was paid between the corporations. That is the third aspect of it.

And fourthly, although there purported to be four per cent interest payable by the defendant Beck to complete the particular act of repaying the loan, the fact is that he did not pay the four per cent.

[fol. 22] That is our first position. And the second position is that even if this is a loan as a matter of law it is still encompassed within the statute.

I just wanted to make that position clear to your Honor.

The Court: Well, Mr. Guzzetta, I do not think that anything you said detracts from the argument that you made in your memorandum, that you are going to prove that this was a loan, and on that basis I intend to entertain an application with respect to the dismissal of the indictment.

Motion to Dismiss Indictment

Mr. Nizer: May it please your Honor, I do now move to dismiss the indictment on the ground that the transaction here complained of was not a violation of law, in accordance with the present statement of the government. The fact that Mr. Guzzetta points out as a distinction for diminishing or detracting from the fact that it was a loan—the fact that there was no security for the loan, even assuming that that was so—to me that is also a further admission that it was a loan, but unsecured as such, and that raises the same simple question as if it were a secured loan.

Now, I know of no rule of law that I can go to that holds that a loan is not a loan, or in order for it to be called a [fol. 23] loan it has to be collateralized, or that the debtor has to pay some interest, or that it has to be endorsed.

Furthermore, in order that we may come to grips here and get to the verities of this situation, and so that your Honor will have it in your mind before you, in previous proceedings had before this Court, at the time of arraignment and otherwise, the government at that time recognized the fact that it was a loan which was the real transaction —which they now suggest would not have been a violation of law—yet indicted these defendants in language as follows:

That on or about a certain date these defendants agreed to pay, knowingly and wilfully—knowingly agreed to pay and deliver to David Beck a thing of value, to wit: money in the amount of $200,000, your Honor, and I repeat that, "a thing of value, to wit, money in the amount of $200,000."

Now, I think that any fair reading of that indictment would mean that what was delivered was $200,000 in cash, as if it were a bribe. There is not the slightest intimation of a loan. Furthermore, your Honor, let me say this: When we were before the Court on the arraignment I challenged this indictment even then, although it was not the appropriate time for motions, but yet Mr. Gillespie, the United States Attorney, fairly stated the government's position, and I read from page 10 of the minutes taken on July 2, 1959, where he says:

> "Both the defendant Fruehauf and the defendant Seymour admitted under oath joining forces to provide the defendant Beck with a $200,000 loan."

Now, your Honor, he claims that they did not do anything else but that it was a loan right there, and then he goes on to say:

> "The scheme was for the defendant Brown Equipment and Manufacturing Company to forward the $200,000 to Beck, after previously receiving $175,000 from the defendant Fruehauf Trailer Company; and $25,000 was from the Associated Transport, Inc.

"While it is claimed by the defendants that this money was paid back a year later with four per cent interest, Beck did receive this payment at the time it [fol. 24] was made and had the use of the money for a substantial period."

Now, your Honor, he says there Beck "had the use of the money." That is a loan.

So as early as July 2, 1959, the government took the position that the use of the money in the form of a loan was what they were referring to.

Need I point out what a fatal, prejudicial variance that is from the allegation that what was delivered was a thing of value, to wit: money in the amount of $200,000, giving rise obviously to the impression which the newspapers did not hesitate to adopt, that they were indicted because $200,000 was passed under the table to somebody, whereas that was not the transaction at all.

It was at all times, and whenever any occasion presented itself, it was at all times brought into the open voluntarily, having been revealed in various conferences with the government, so that the government knew this as far back as 1956 and 1957. And so, your Honor, we are dealing with a loan, and while I do not adopt any of the other language with which the government characterizes this transaction, in what your Honor was kind enough to read into the record, I say that what is there, despite the fact that they have [fol. 25] not told the whole story, makes this indictment even more outrageous. What is there is sufficient to indicate that this is not only a fatal and substantial variance, on which ground alone the indictment should be dismissed, but clearly apart from that there are other grounds, and I will address myself to them. I do so with some reluctance with respect to the length of the argument, because I know that your Honor has pored over these briefs and has undoubtedly absorbed the many arguments time and time again, and my purpose is not simply to make an address for this record or to belabor the points because it is only logical for me to assume the fact that your Honor has read the authorities. That being the fact I need not quote from them at length, but I would like to make an outline and make a short argument rather than an extensive and detailed

statement with respect to Section 186, part of the National Labor-Management Act. That Act has a purpose, a very benign and proper purpose, which is to protect the unions from having their labor leaders traffic with their rights or sell away their rights, or diminish their rights, because they have at the same time to deal with employers whose employees are members of that union for which that [fol. 26] particular representative is negotiating.

Now, your Honor, that is a very salutary section and we have no quarrel with it at all.

In all of the cases that have dealt with its purpose, it is clear that wherever the situation arose between the alleged representative of the employees and the employer, it was indicated that there was an attempt to traffic with the representative, the labor representative. Where the fact was that there was a personal relationship by reason of the fact that these representatives are friends with people in the industry—that the labor leader may be friends with others in the industry (even though they fight like cats and dogs, there is still that relationship) so that they have a chance to talk with each other, and a chance to deal with each other, without labor trafficking then Congress has indicated that that is not violative of the statute.

Also, your Honor, while on this same subject, Judge Learned Hand in his dissenting opinion in the Ryan case, which was later upheld by the United States Supreme Court, specifically raised the question, though that was a [fol. 27] person who was involved in a terrible state of facts—the nefarious labor leader Ryan, who received cash under the table which was purported to be all kinds of gifts, given to him in the month of May but supposedly Christmas gifts. That was the theory of that case, and it was an evil case. And there was a labor leader who had negotiated the contract and signed it.

We have no contract with the International Teamsters, and we never negotiated with Mr. Beck, and the government does not claim that we had. Only 289 employees in the Local Teamsters Brotherhood Unions, out of 10,000 employees—that is what we have. But forgetting the distinction, in fact Judge Learned Hand in that case, at the end of his opinion, discourses of a gift—in the sense that it was used, as a gift and not a loan—and indicates that

if the gift was given to a labor leader who was also your friend and it was not given to influence labor representation but because he was your friend, he said that would be another matter which he would have to deal with in due course. That is in substance what Judge Hand said, so that even in the most flagrant case of sheer bribery, sheer [fol. 28] bribery, the Court held up a flag and said that you must determine whether the purposes and intentions of the statute are violated by such gifts. That has to do even with gifts.

Now, in this situation, the government, rushed in with an indictment on the last day, about five years after the event, and it has rushed in with this indictment with full knowledge of the testimony that has been developed by the FBI investigators, FBI investigations, to which we submitted ourselves voluntarily. As a matter of fact, one of these men here even was sworn in by an FBI man and gave testimony.

Now, your Honor, the defendants volunteered all this information, and the government as a result knew all the facts and the truth of this situation which was fully set forth for them.

Now, for the purposes of this motion, and having reference to these facts as admitted it is important, your Honor, we believe, to get a perspective of them.

There are three links to this chain. On the left is Mr. Beck; on the right is the Manufacturers Trust Company, which ultimately made the loan, not through Fruehauf [fol. 29] Trailer Company, not through Associated, not even through Brown, but the loan was made by the Manufacturers Trust.

The government admits that there was a subsequent loan, and, as your Honor read from their brief, it was "renegotiated" as they put it, and it was repaid. That is correct. It was nearly six months, or there was nearly a six-month interval, between this first link and the third link, and we have been indicted with the second link in the meantime. It was an interim stop-gap arrangement, and provided money until the Manufacturers Trust Company made the loan, which it did, and the description of which is before your Honor. This should be seen in the proper perspective, as bearing upon the middle link, which

at best, according to their theory, was breached. That is the period or the breach in the gap up until the time when the bank came through with the loan, during which they indicate that there was some violation of law.

Now, if we only had the first link and the third link—the Manufacturers Trust Company—I don't think under any theory the government would have elected to claim that there was any violation of law. But with all of this [fol. 30] present, they go upon the fact that in between those two transactions, there was an interim loan, and as result there was involved a violation of law.

[fol. 31] But I point out to you, your Honor, that it does not make a bit of difference in connection with this. There was nothing surreptitious about it nor was there any wrong purpose in the fact that, as an interim arrangement, the situation arose which your Honor read as described in the Government's brief.

It does not make a bit of difference how it was done. It seems to me in tracing all of these steps, there is raised an implication of deviousness, and that such deviousness should be applied in the action of the defendants.

Well, what did happen was that until the Manufacturers Trust Company did give this money, we in the meantime helped out Mr. Beck with the loan. That loan, I repeat, your Honor, was something which was openly done. They had included in it the four percent interest to be given to the Brown Equipment Company, which advanced the money until the Manufacturers Trust Company came through with the loan.

This is not a case, your Honor—as has often occurred, unfortunately—where someone had to transact business, a case where he says, "Well, I intended it to be a loan" five years after the fact. No, this is not such a case. This is something that the Government knew all about. Simul-[fol. 32] taneously the Government conceded it themselves when originally they were supplied with all this information. The FBI examined the files fully. They sent men to Washington to find out all about this and they were supplied with whatever information they asked for, supplied with all the documents at our command, and they were given all that in 1954, and in 1954, in July, they knew about the payment, they knew all about the money, and

they knew all about every aspect of this loan. Beck was loaned $200,000 by check, and we endorsed the notes to the bank, and this was repaid, your Honor, before a single inquiry was made. It was not repaid because of any action on their part. This transaction was made honestly and closed honestly, and it was made in good faith.

The McClelland Committee looked into the matter in 1957 when they were examining Mr. Beck about transactions and when this one came out, but at that time in 1957 this loan had been repaid for two years and repaid in good faith.

Now the question is as to the statute which deals with a misdemeanor, which is malum prohibitum, and not malum in se, in connection with such a transaction.

[fol. 33] I may say at this time, your Honor, that I am going into some of these things in the manner in which I am because there is no jury here, and we more or less have an understanding. I say the reason why Mr. Beck asked that the matter be handled in a particular way, was that here were Mr. Fruehauf and Mr. Seymour, having been grouped together on this committee called A.C.T., which was bought into being by the trucking companies, the large trucking firms, who were called upon when the Korean war was starting to keep the trucks moving, to see that the shipments of material were moving adequately back and forth, and they did all that they could to see that such things transpired.

Now I hope Mr. Beck takes no offense at my saying this, but I don't think there can be any dispute about the facts as they existed, because in 1954, he was a distinguished labor leader. He was invited by three presidents to the White House, and time and time again there were arranged various conferences, and he attended these conferences in the White House. Also, President Eisenhower, in 1956, a year and a half after this loan was repaid, called him because he was a distinguished citizen, and we were not trafficking here with a man who is now made the subject of [fol. 34] unwarranted inferences, of improper motives, or engaging in improper practices in this transaction; he was a man of the highest integrity, and was honored and considered as such when he was invited to the White House, as well as other places.

Now, of course, your Honor, as I started to say, under the statute there is of course the distinction which is made between malum prohibitum and malum in se, but I think that you also have to get behind the legislative history and talk about the substance of the crime which is alleged here in this indictment.

Well, everybody knows that unlike malum prohibitum, malum in se has to do with crimes that are morally reprehensible, and you do not have to go much further into the matter as to their meaning in the statute, although it is well established by the federal courts that whether malum in se or malum prohibitum, it will be strictly construed in favor of the accused. We have cited North American Van Lines v. United States, where it was stated:

> "It has long been recognized that in the construction of a penal statute, all reasonable doubts concerning [fol. 35] its meaning must operate in favor of the accused."

And in connection with malum prohibitum and malum in se, the literature with respect to it is clear that in malum prohibitum, if something happened before the thing was actually prohibited, while later on it may be made wrong, it was not wrong the day before the legislators made it wrong.

So, too, until they enacted this legislation having to do with incidents such as this, and before there developed certain labor-management practices, the legislature previously had felt that perhaps it was not wrong even to give a gift to a labor leader. Then the legislature decided in its wisdom to place certain restrictions upon such gifts to a labor leader, but until the legislature passed that act it was not morally reprehensible even to make a gift to a labor leader let alone a loan.

Therefore the rule has grown up and the cases which we have cited make it clear that when you have something that is prohibited, something which is not in itself morally reprehensible but became so because of the wording of a particular statute, the law is that you must give fair warn- [fol. 36] ing to a citizen. He is entitled to know what it is that he is being charged with. And your Honor can

well understand the purpose of that. He does not act at his peril until the legislature has given him ample notice of what it had intended to do. A citizen is entitled to know what the statute forbids and the statute must be clear and unequivocal in that respect. In other words, your Honor, a statute creating a new crime, in derogation of the common law, must give the public fair warning in clear, everyday language, of the precise acts thereby made criminal, and since the statute proscribes and punishes acts which previously had the sanction of law, it is required to give the employer a clear and unequivocal warning, and in language which the ordinary layman will understand, of precisely what acts are rendered criminal and will result in the deprivation of his liberty or property and his reputation.

Now there is one case where a malum prohibitum statute was cited, and it involved any vehicle that runs by motor and not on rails, and as your Honor knows, the Supreme Court held that that did not apply to an airplane.

[fol. 37] Now, your Honor, I am not talking only about the average layman's innocence about these things—those who have been faced with the charge of such a crime. These are men of the highest reputation and standing. I say that they have been injured far beyond anything that even an acquittal or a dismissal will do for them, but since they are charged with a crime of this nature, they must know at the time that they do the act, which was in the nature of a loan and which was repaid, they must know that it is a crime to do it, because if they had known about it they would not have done it. So, as regards the statute covering a motor vehicle that does not run on rails and that runs by motor, if the legislature meant to include an airplane it should have said so.

Similarly with the statute which says that if you carry a knife or any sharp edged instrument, by the way, malum prohibitum—just carrying it—and if the same thing were to apply when somebody is arrested for having a razor, it was held that if the statute meant that you were to be indicted because you carried a razor, then the legislature should have written razor into the statute, and not deprive an innocent citizen of his rights and place him in jail. Even [fol. 38] despite the fact that the Government brought in a number of definitions—or rather the Legislature brought

into the case a number of definitions—in standard dictionaries, which defined a razor as a knife in precise language, covering the particular kind of instrument used there, the Appellate Division of the New York Supreme Court said that they were not interested in dictionary definitions, that they just wanted to see that fair warning was given to the citizens.

So, your Honor, as I say, the cases are replete, in connection with malum prohibitum, with holdings that you must give clear warning and exact definitions.

Now let us see what this statute says. Is it clear, definite, or should the indictment be thrown out as being preposterous under the language of the statute? The statute says pay, agree to pay, or deliver. The verbs are important, your Honor. Pay or deliver a thing of value, money, or a thing of value.

You don't pay a loan; when you go out and you repay a loan, then you satisfy it, but to "pay a loan," is that language clear? When you make a loan, or when you need a loan, then you "make" it. I have never heard of such an expression, as "pay a loan," and I daresay advance that [fol. 39] that amendment, twelve years later, puts in that wording of the statute so as to remove all doubt on the subject, and I will refer to the cases which hold so.

Now, to come back to the statute, and assuming that there has not even been an amendment, just the words or the verbs "pay" or "deliver," and now they say a thing of value, pay or deliver a thing of value, now let us see. I can either pay or deliver money. I can either pay or deliver a thing of value, but I certainly can't pay or deliver a loan, because that language isn't applicable at all to it. But the Government has made this task even easier. They say in their indictment pay and deliver a thing of value, to wit, money in the amount of $200,000. They have ruled out even a semantic argument about the matter, let us say, because when you use those words and particularly considering the statute as it is worded, and then using the words "money or thing of value," if you have a loan, then you are dealing with something else than money. However, if there is to be embraced within the term "thing of value" the word "money" then it is clearly redundant. Then it is to pay money, and that is the way they would

[fol. 40] have done it, no one else has, and when the statute says what it does, does the statute mean that? Is that fair warning? Do you deliver a loan when you make it? You certainly do not. You don't deliver anything, and if the statute wanted to say that or to use language that would include a loan, it would have so indicated. We set forth those cases in our brief, showing they certainly knew how to do it, when they so intended.

Here, for example, is another specific example: offer or make, offer or make a loan, offer or make a loan. Well, that is specific. This is specific enough for my purposes, and my purpose is that——

The Court: Was that the bank examiner's case. I think it was, wasn't it?

Mr. Nizer: That's right.

And we have also cited the case of Burgess vs. Salmon in our brief, which is another good illustration and interpretation of the 1959 amendment, and which is the case, your Honor, that I have just referred to.

I am going to leave the amendment for the moment because even without amendment I think this would be doubly clear, and I need not emphasize in because they [fol. 41] say to pay or deliver a thing of value, and that ought to mean something else than money, but no, they say, to wit, money in the amount of $200,000.

Well, in a situation such as is involved in that case, your Honor, I do not hesitate to say that it is against the Government, but I think that is the fault of the indictment aside from the statement indicating that it was money and, therefore, not possibly a loan.

And among the cases, your Honor, dealing with fair warning is the Cardiff case, cited in my brief, and the case dealing with the delivery of a telegram, where the Court said that if Congress intended to say so they should have said it.

[fol. 42] Your Honor will also recall that the obscenity statute read "if you send any writing", among other things, and they sent a letter. If Congress meant to say a letter, they could have put in the world "letter". Even though it is a writing, it means something else. You have to give the most explicit warning, and that is the standard

which I think goes to the heart of the case, fair warning. The very thing which I think makes this an outrageous indictment is to say that these two men—I represent Roy Fruehauf, but I put Mr. Seymour in exactly the same classification—neither of them ever had any difficulty in their lives; they both have excellent reputations—to say that these two men were guilty of a crime—when I saw these men downstairs fingerprinted it broke my heart—on the ground that they should have known under this statute that a loan arranged with the bank at four percent and repaid is a crime. It is really outrageous, your Honor.

Now I am going to skip the rest of my argument which is contained in Part I of our brief. Twelve years after, in 1959, after the McClelland hearings were held, there was an amendment to this statute. It is important to note the [fol. 43] background of that amendment, your Honor. It bears forcefully on this motion. In the McClelland hearings, which were designed to examine Mr. Beck, they were investigating his various affairs, these two men were drawn in. Anything that Mr. Beck had done, no matter how innocently—and I want to say clearly here I hold no brief for Mr. Beck, but I think he was just as innocent as these two men are in this transaction—but under those circumstances these men were drawn in. They had no idea they were going to get into trouble. They were innocent in their own minds and hearts. Senator Kennedy actually said, "Now I know this is no violation of law," talking to my client, and you haven't done anything legally wrong. That comes from the official minutes. I know you haven't committed any violation of law, but do you think it was morally right for you to do this?

My client, "I did nothing morally wrong. I had nothing to do with labor. He had given me a million and a half dollar loan through union funds, an open transaction, made by the lawyer for the union and the financial officer, documents are in existence, four percent interest."

[fol. 44] When Mr. Fruehauf was in trouble in his company Mr. Beck befriended him, saying "The union might make you a loan" and the union made a good loan for $1.5 million to Fruehauf, which was paid back at four percent interest. That was all before the Senate Committee.

Now, naturally, he felt friendly toward the man for sav-

ing his company. He had to fit for its existence and Mr. Beck befriended him. It was union funds, but nevertheless it wouldn't have happened unless Beck called the union's attention to it, so he was grateful to him.

Consequently, within a month thereafter Mr. Beck, for reasons I don't know, said, "Can you help me place a loan for $200,000?" If he had the money personally, he testified, he would have given it to him right then and there, probably without interest, but he didn't have it. Mr. Seymour said, "I think I can place it in the Manufacturers Trust."

Now, when Senator Kennedy and several other senators had said, "Of course it isn't any violation of law, but do you think it is right to do this?" they were thinking of future legislation. As a result of that, as the Congressional hear- [fol. 45] ings show, they said, "We think we ought to be told about this from now on." So they amend the statute twelve years later with the words "thing of value". Henceforth no one can doubt it. Under the authorities, the Ryan case and the other cases, if a person you are lending money to, not because he was a labor leader, but because he was a brother-in-law or particular friend and it didn't affect labor, even then I don't think that would be a violation, but we don't have to conjure up that situation.

Now what do the courts hold? I shall be brief and not elaborate because your Honor is familiar with this. What do the courts hold is the effect of an amendment of the statute? Simply this: where a statute is amended to include a loan, it is a conclusive presumption that the statute prior to the amendment did not include loans. In this case that presumption becomes the final construction that is irrefutable because the very language of the people who wanted this amendment was that "This is not provided for, and we had better provide for it; we had better make the statute tougher." They wanted to make it tighter. Therefore we no longer need debate between counsel as to the interpretation of it. We now have the legislative enactment saying [fol. 46] that this wasn't a crime before but they have made it so in their amendment of 1959, twelve years after the statute was originally drawn. And the cases on that proposition are that the Constitution provides that a man may not be tried for a crime which was not a crime retroactively at the time he performed the act.

So I conclude, your Honor, resting upon our brief for further illustration, that as a matter of substantive law there is, first a fatal variance in the indictment, and I urge dismissal of the indictment.

Aside from the variance, it is now conceded that this was a loan transaction which was not a violation of Section 186(a) and (d) by any of the defendants.

I have other motions addressed to the statute of limitations, but there again, since I haven't had the benefit of the Government's brief, I shall, with your Honor's indulgence, reserve my right to make such motions if your Honor will permit me at another time, if it is necessary at all, and move further with respect to this matter.

The Court: I am going to declare a ten-minute recess and I am going to inquire of the other defendants when I [fol. 47] return whether they join in the application. So you should have time to make up your minds as to whether you want to be participants in the motion made by the defendant Fruehauf.

(A short recess.)

JOINDERS IN AND FURTHER ARGUMENT IN SUPPORT OF MOTION TO DISMISS INDICTMENT

The Court: Mr. Seligson, does the defendant Fruehauf Trailer Company join in the application for a dismissal of the indictment?

Mr. Seligson: Yes, your Honor.

The Court: Do you wish to add anything to what has been said by Mr. Nizer?

Mr. Seligson: No, your Honor. There is very little if anything that I can add to the argument advanced by Mr. Nizer in support of the motion to dismiss on that ground. The motion, I take it, is made upon the basis of the indictment and the conceded facts as read by your Honor into the record?

The Court: Yes.

Mr. Seligson: And the motion is twofold? The motion, as I understand it, is to dismiss because the statute did not contemplate and did not cover a loan, and, two, because there is a fatal variance between the indictment and the facts as conceded.

The Court: Yes.

[fol. 48] Mr. Seligson: There is nothing further I can add, your Honor.

The Court: Mr. Vance, on behalf of the defendant Burge Seymour, do you join in the application?

Mr. Vance: Your Honor, I do join in the application.

The Court: Do you wish to add anything?

Mr. Vance: Very briefly, your Honor.

Mr. Nizer has very eloquently stated the law with respect to this matter, but there are one or two points which I would like to touch upon and perhaps underline.

First, I will not dwell on the facts at all except to comment briefly on the statement by the Government that the interest was not paid. As far as Mr. Burge Seymour is concerned and Brown Equipment Company, I think the Government will concede that the interest was repaid in full.

Mr. Guzzetta: I don't concede any such thing. My reference was to the interest to be paid by Dave Beck, and I didn't concede it was paid in full; quite the contrary.

The Court: Did you intend to intimate that the interest had been paid by Mr. Beck?

[fol. 49] Mr. Vance: I believe I did, if your Honor please.

The Court: Well, that is not what the Government——

Mr. Vance: I believe I was just trying to straighten out the records, your Honor.

The Court: But I want the record to show what I read from the Government's memorandum spoke of the interest from Dave Beck and not of the interest to the Manufacturers Trust Company.

Mr. Vance: Your Honor, I think that this is really not relevant. I merely tried to straighten out the record on that point.

I would now like to turn to the sole question here at this time and that is a question of law. First, were loans encompassed within the meaning of Section 186(a) at the time of the acts charged in the indictment? Second, whether or not a reasonable ordinary man was given fair notice that such a crime might be charged under that statute. I think the answer must be a ringing no to both of those legal questions.

First, as Mr. Nizer has pointed out so eloquently, the plain meaning of the words of the statute does not include [fol. 50] "loan." An ordinary common man could not possibly on reading that statute have learned or had been put on notice that a loan was prohibited by this statute.

As Mr. Nizer has pointed out, it is a malum prohibitum statute. In such case the requirements laid down by the courts long ago and adhered to ever since say under the circumstances the ordinary man must be given fair warning if he is to be held.

Now, your Honor, this is not simply a canon of statutory construction; it is a principle of constitutional law, and the courts have held that where a statute is so vague as not to put an ordinary reasonable man on notice, that to forbid such action would be a deprivation of due process under the Fourteenth Amendment to the Constitution of the United States, and if there had been any question——

The Court: Well, may I interrupt to inquire whether the thrust would be under the Fourteenth Amendment in this court or under the First Amendment?

Mr. Vance: I think it would be under both, your Honor, and the Fifth and Sixth as well.

The Court: I should have said the Fifth instead of the First.

Mr. Vance: Yes. Now, if there had been any question, [fol. 51] which I don't think there was, it certainly was laid to rest when Congress last year, in 1959, closed this loophole in the statute.

I want to refer very briefly to one or two statements made at the time the Congressional hearings were on, when this amendment was effected.

Senator Barry Goldwater, who was a member of the McClellan Committee and who sat and heard all the testimony testified to in due course on the particular transactions which are the subject of this indictment, had this to say speaking before the House of Representatives on a companion bill (reading,.

So this emphasizes the fact, your Honor, that here one of the men who was in Congress at the time of the initial enactment and who heard all of this testimony believed that loans were not covered, and this was adding a new prohibition to cover them.

It is interesting to note, your Honor, that 163 members of Congress who enacted the 1959 amendment were also members of Congress at the time the 1947 act was adopted, and the Congressional history shows that not one of them raised any question as to whether the original statute had included or proscribed loans. I think that is eloquent evi- [fol. 52] dence of the fact that Congress clearly believed that loans were not included in the original 1947 act.

Finally, the cases are clear, crystal clear, your Honor, that where there is a loophole in a statute and that loophole is closed by subsequent enactment of legislation, there cannot be an indictment or conviction under the previous statute which did not include the language that has been filled by the loophole.

That is all.

The Court: Mr. McCreedy?

Mr. McCreedy: On behalf of Brown, your Honor, I wish to join in the application to dismiss.

The Court: Do you wish to add anything to the argument?

Mr. McCreedy: Well, no, I will not add anything.

The Court: Mr. Burdell?

Mr. Burdell: Yes, your Honor, I join in the motion.

First, Mr. Beck is indicted under a separate count in the indictment. Nevertheless, I am sure that there can be no dispute concerning the fact that the argument which Mr. Nizer has made and which Mr. Vance has made and [fol. 52a] in which other counsel have participated and concurred also relates to count two of the indictment.

I should tell the Court that with respect to the memorandum of law which I submitted to the Court today, no cases or authorities have been added, but on the contrary, on this particular point, the defendant Beck has adopted the memoranda submitted by the other defendants, and I adopt the argument made by Mr. Nizer and Mr. Vance.

I would simply like to add this thought, your Honor, particularly with respect to the question of the loan transaction, whether or not that is encompassed within the scope of the act. The Government's judicial admission is, if I understand it, to the effect that Mr. Beck paid some interest; they say he didn't pay all the interest. I believe the Government is incorrect, inaccurate in that, but nevertheless

they do concede that he did pay, I believe, $4,000 by way of interest.

Now in that connection I am reminded of the statement that many years ago was made by Calvin Coolidge in connection with loans from the United States to European countries during the First World War, where he said those [fol. 53] countries hired the money, and in effect that is what Mr. Beck did, whether he paid one percent interest or two percent interest or four percent interest or whatever interest he paid or even if he only paid a portion of the interest. He hired the money for $4,000.

Now I see no difference in that situation or between that situation and the situation which would arise if, for example, he went down to the Fruehauf Trailer Company and hired a trailer for his use for some peroid of time. The Government's theory, as I understand it, is that because he hired the money, he had the use of the money during a period of time, that that was a thing of value. Now, of course, if he hired a trailer for a period of time and paid for it, he would have had the use of the trailer. Presumably the trailer to some degree would have been a thing of value, but it certainly would be ridiculous, I think for anyone to argue that the hiring by Mr. Beck of a trailer and the using of a trailer would constitute a violation of this act. So, by the same process of reasoning, which I believe is logical, it is ridiculous to argue that the hiring of the money, in paying $4,000 for it, is a thing which vio- [fol. 54] lates this statute.

In addition to that, I want to say to the Court that I am extremely impressed by the argument and the idea of variance in the indictment. It seems to me that the Government's brief in effect constitutes an amendment of the indictment, which, of course, cannot be done under the old decision of ex parte Bain and subsequent decisions. Here Mr. Beck is charged with receiving money. Nothing is said about a loan, and as late as last night in a conference, a brief conference I had with one of the other counsel, I was wondering what the Government was going to do about this question of loan. I was wondering if they were simply going to prove that the defendant Beck received $200,000 from the Brown Equipment and Manufacturing Company and rest and leave it to the defense to prove that the money

was repaid. I was wondering if they were going to take some position, perhaps, that the loan was a sham of some sort. Under the indictment it says that he just received the money. That seemed inconceivable to me, that the Government would now come in and say, "Well, he didn't just receive the money. Actually what he did was hire the money" and so under those circumstances I believe [fol. 55] there is a fatal variance, because, just suppose we go to trial on this case on the Government's theory that this was a loan and suppose there was a verdict of acquittal. I see nothing which would prevent the Government from turning around tomorrow and indicting these same defendants and then taking the position that it wasn't a loan, but it was a sham arrangement, or adopt some other theory, so that we have to try this case twice.

The Court: Well, Mr. Burdell, let me interrupt. You are excluding the statute of limitations when you make that statement?

Mr. Burdell: I am excluding the statute of limitations, yes, your Honor, but I don't believe that the effect of the statute of limitations has any effect on the question of whether or not——

The Court: That's right. I understand that.

Mr. Burdell: That is all I have to say, your Honor, except that I reiterate that I fully adopt and concur in the argument made by Mr. Nizer and Mr. Vance, and I believe those arguments are expanded in emphatic and extremely persuasive detail in their briefs, and I adopt the arguments and the briefs too.

The Court: If I am correct, I have now on the record an agreement by every defendant to join in the application [fol. 56] to dismiss the indictment.

Mr. Sullivan: I think you have omitted Associated Transport, your Honor.

The Court: I beg your pardon, Mr. Sullivan.

Mr. Sullivan: I concur in what you said. I join in the motion. On behalf of Associated Transport I concur in the argument and I adopt all the grounds.

The Court: Thank you.

Now I have covered all the defendants. I will now ask the Government if it wishes to be heard in opposition.

Mr. Guzzetta: Yes, it does, your Honor. I think at the outset I can say that undoubtedly I can't match Mr. Nizer in eloquence but I can present my argument more elliptically than he did.

As I understand his argument and the arguments advanced by the other co-defendants in this case, you can bring them down into three categories. First, does the indictment spell out a crime, which is really what we are talking about when we address a motion to the indictment at this stage of the trial. I think, your Honor, we are limited to the four corners of the indictment, although you [fol. 57] may disagree with me on this point——

The Court: Very strongly.

Mr. Guzzetta: Because my brief is only—the first three or four pages which your Honor read from——

The Court: The first three or four pages dealt with what you promised to prove, the facts.

Mr. Guzzetta: Precisely, as supplemented by my statement in case there was ambiguity. I don't know that an assistant United States attorney ever bound the Government before like this.

The Court: Well, Mr. Guzzetta, I have had the experience where a man got up before a jury and got kicked out on his opening statement.

Mr. Guzzetta: That is a different matter. My opening statement is yet to come.

The Court: In this case it may never come. We will see.

Mr. Guzzetta: Your Honor knows I don't——

The Court: I don't know yet. I am waiting to hear your persuasive argument.

Mr. Guzzetta: Thank you, your Honor.

The second argument that Mr. Nizer has made and the [fol. 58] co-defendants have adopted is whether or not my judicial admission made it a loan, that I call this a loan and thereby bound the Government to this theory and that it constitutes a fatal variance when compared with the indictment.

Third, I take it, is whether or not the statute is unconstitutional by reason of vagueness, the argument of Mr. Vance articulated by him a few moments ago.

I shall address myself to these three points: first with respect to the four corners of the indictment. The indictment is a very simple document, your Honor. It charges precisely what I said in the first few pages of the memorandum, that three corporations, three corporations which employed teamsters who were represented at the time in June of 1954 by Dave Beck, who was the president of the International Brotherhood, that these three corporations implemented by their principal officers, gave $200,000 to Mr. Beck.

The second count says Mr. Beck received the $200,000. On the basis, your Honor, the four corners of the indictment, I submit match rather squarely with the statute. I won't take the time to read the statute which Mr. Nizer excerpted, but I would simply say that 185(b) and (c) [fol. 59] provide practically identical language, that is the indictment follows the language of the statute practically identically.

The Court: Pardon me. Is there an inadvertent omission in the indictment or did you misspeak yourself when you said 186(b) and (c)? The statute cited in the indictment is 186(a) and (d) and, of course, Section 2 of Title 18, which is aiding and abetting.

Mr. Guzzetta: 186(a) and (d).

The Court: You said (b) and (c).

Mr. Guzzetta: I didn't mean that.

The Court: You didn't intend to mention 186(c)?

[fol. 60] Mr. Guzzetta: No. 186(a) and (B). From the four corners of the indictment which Mr. Nizer rather assidously avoided, although I think he did paraphrase it to some extent, we go on to the second question, and that is whether or not there is any fatal variance between it and what the government has said it intends to prove in this case, and I submit that that is supplemented by what I said a few moments ago about what is charged. Now, what they have said is this, and I think, your Honor, when you look at it, at the final nub, core, of their argument, I must say I think it is not an argument which rises to the dignity of logic, even though Mr. Nizer said it was enthroned by reason. They have said in effect that when we charge that this transfer was made and later on talk about a loan that we have prejudiced the defendants to such an

extent that they can't reply to this indictment, that they can't build and prepare a defense in a court of law, that they don't know what they are being charged with precisely and that, perhaps, I think Mr. Burdell finally mentioned that perhaps they are being subject to double jeopardy. Nothing of the sort is there. It is matter of logic. What we charge is what happened on or about June 21, 1954, not what happened thereafter. Your Honor, if it [fol. 61] be a loan, or if it be a repayment without other attributes of a loan, is a matter quite immaterial to the government's case, and quite immaterial to the indictment. As a matter of fact, Mr. Nizer made something of a big matter out of providing us with all this information. All the information that the government has in the case is information provided by the defendants, taken from the defendants' books and records and supplemented and underscored by statements and admissions made by the defendants. But I think this argument about variance, your Honor, even if there could be, although I don't think there is, a technical variance between what the government intends to prove and what is stated in the four corners of the indictment, is an argument, your Honor, I submit, that holds no water whatsoever.

The Court: Mr. Guzzetta, may I interrupt to inquire about something?

Mr. Guzzetta: I wish you would.

The Court: Assuming that this case was tried and the Court was disposed to frame special interrogatories to the jury, and one of those interrogatories was, Was the transaction a loan, and the jury brought back the answer No: do you think the Court could allow that answer to stand on the basis of the facts as you have set them forth in your [fol. 62] brief, or wouldn't the Court have to set aside the finding as being contrary to the evidence and the weight of the evidence?

Mr. Guzzetta: Your Honor, in the context of the remarks I made after you read in open court my brief, I would say that that would not be an erroneous finding by them.

The Court: In other words, your position is that despite the facts which you set forth this could be held to be not a loan? When I say the facts you set forth, I mean the facts in your memorandum.

Mr. Guzzetta: As I tried to indicate, and I can answer that, and I will with Yes or No—what I tried to indicate was that the government's position is twofold. If it wasn't a loan, if the jury determine on the basis of the facts which they hear that this was—that the outer clothing, fabricated by one highly complex intercorporate transaction, didn't make this transfer a loan, clearly, it would come within the statute. There would be no problem in my mind at all. Secondly, if the jury decided that it was a loan, I wouldn't say that that would preclude them from finding a verdict of guilty because, as I am about to go into, a loan is encompassed under the statute prior to amendment, and I am [fol. 63] going to use Mr. Nizer's authority.

The Court: As a thing of value.

Mr. Guzzetta: Yes, as a thing of value.

The Court: I thought that was the thrust of your argument.

Mr. Guzzetta: I think it could be said, use of the money.

The Court: Yes.

Mr. Guzzetta: Yes, and the transfer under those circumstances specifically set forth in the indictment sufficiently apprise the defendants of what we were charging them with.

Now, the last question is whether or not the statute is unconstitutional for vagueness. Mr. Nizer elaborately tied that in with the question whether or not the ordinary reasonable person could understand that what he was doing was a crime.

Now, there are two factors that have to be taken into consideration. First you have to look at the statute, what it prohibits, what the interdictions of the statute are, and you can't just look at that phrase, thing of value, and say, "For heaven's sake, that is too broad; certainly a reasonable man couldn't understand it." And you have to take [fol. 64] a look at what the defendants did, and I think Mr. Nizer was explicit in setting forth the additional facts your Honor should consider in this matter. Here we have Roy Fruehauf, president of a corporation he has admitted to be one of the largest trailer companies in the nation, probably in the world. I think it would be fair to call him a good business man. Burge Seymour, president of Associated Transport Company, one of the largest truck manu-

facturers in this nation. I think it would also be fair to call him a good business man.

The Court: Did you mean to say truck manufacturer?

Mr. Guzzetta: Associated Transport.

The Court: Did you mean to characterize them as manufacturers?

Mr. Guzzetta: Truck concerns, excuse me. If I said manufacturers I didn't mean that. These two business men, Mr. Nizer would have us believe, did not consider giving $200,000 to Mr. Beck for approximately a year to be something of value.

Now, the fact is, as well as the logic, your Honor, and I am not going into what would be consideerd a captious argument about the interest not being fully paid, or the fact that there wasn't any security by Beck for this $200,- [fol. 65] 000, or the fact that they couldn't get it from a bank for the first six months; they tried first to get it from a bank and they couldn't. So they went and used the corporations which they controlled, and this, your Honor, is where they ran afoul of the law, but I don't want to emphasize that——

The Court: Just a moment. You have confused me. The statute upon which this indictment is predicated says it is a violation of the law because the corporations made the loan, because they had dealings with the union?

Mr. Guzzetta: Because the corporations are employers of employees in an industry affecting commerce. I say the facts, because the logical argument, that I have just enumerated briefly, belie this contention. The fact of the matter is that Fruehauf himself has admitted, and the government will read his admission into the record, that he was doing a very considerable favor for Mr. Beck. Now, tied to this, Mr. Nizer mentions some things which occurred to him as being shocking, and I think when he made reference to the indictment filed—presented by the grand jury he uses the word deceptive as well. Referring now to the statute before it was amended, what the statute means, [fol. 66] I think the government has precedent both ways, both before and after the amendment. Mr. Nizer mentioned the Ryan case by specifying Judge Learned Hand's dissenting opinion and then went on to say quite clearly that this was the opinion which the Supreme Court in

reversing the Second Circuit's reversing the Ryan conviction adopted. They adopted Judge Hand's opinion. So it is good precedent. What is shocking about this matter is the way Mr. Nizer abuses precedent which he cites.

This is precisely what Judge Hand said in discussing as to what Congress wished to do when it enacted Section 186, Title 29:

> "Congress wished to prevent employers from tampering with the loyalty of the union officials, and disloyal union officials from levying tribute upon employers. The first was the situation at bar; the employer did not bribe the accused;"

Mr. Nizer said that Ryan involved a brazen bribe complex of fact.

> "it did what has been done, time out of mind, when one person, knowing that he is likely to have continuous dealing with another in which the second person will be acting as a fiduciary, wishes to insure a friendly approach to the fiduciary; and makes him presents [fol. 67] or does him favors, or in other less palpable forms tries to turn the edge of his allegiance."

This is what the statute, in the view of Judge Learned Hand, subsequently adopted by the Supreme Court, was intended to prohibit.

And then considering the fact that the $200,000 transferred involved a period of over a year before it was finally repaid by him under the circumstances that I have already enumerated, and which I shan't emphasize by repeating them again, it is probably ironical, but it is the same wording that Mr. Fruehauf has used before the Senate Committee; the defendant has commented "That's right," he said, "I did him a very considerable favor."

Now, I will finish up with this thought, coming to the statute as it was afterwards amended. The amendment does include, of course, words which were not included in 186 before amendment, and the defendants would have your Honor reason that because now the statute includes such words that it is not to be assumed that a loan is subsumed under the terms "other thing of value" before it was amended.

Now, that is what he says, and I think on its face it is a [fol. 68] logical fallacy, and I think I can establish in logical terms that it is a fallacy, termed (and this is not an anatomical reference) in logic the fallacy of the undistributed middle.

There is a general provision in the statute both prior and subsequent to the amendment related to "other things of value;" and I have already discussed the question and I shall not go into that now.

Counsel also enumerated some of the things that he contends may or may not have been included in that phrase "other thing of value," as analogies. But I think that simply because after the amendment the statute includes the word "lend" does not mean that this was not included in the phrase "other thing of value" prior to amendment.

In the first place there is no logical connection between those conclusions at all. It is simply what defense counsel urges your Honor to infer from what he has stated, and what I submit is not correct, in logic your Honor; because there can be any number of reasons why Congress later amended the statute and then decided to put in, as well as other additions, the word "lend" to supplement "other things of value."

Mr. Vance argued on the basis of the legislative history [fol. 69] of the amendment, but I do not think it is necessary at this time to analyze that legislative history because, at least in this regard, there is no ambiguity. Nevertheless, your Honor, if you consider the omnibus phrase ambiguous, I would like to have the opportunity to do this: To submit to you an analysis of the legislative history. I think your Honor will find that what the Congress was doing, after the amendment, was to include the intention of Congress to have the statute apply to a broader category of recipients—or middlemen—and not to specify lending which had not been included theretofore. In any event, I believe I can submit at least some persuasive authority on that basis. Now more particularly, there is one case, the type of case involving a matter of the kind involved here—a loan—and it is a case in the Northern District of New York, United States v. Golden, where the District Court said, and I would like to read to you, if your Honor please,

what the Court said in that case relative the question of whether a loan is a thing of value:

> "It is urged that a strict construction of the statute is required under circumstances where as here an act not unlawful in itself is prohibited by Congressional enactment."

[fol. 70] The facts in this case involve the lending of a tugboat to a union official.

> "It is further urged that since the above sections were amended in 1959 to make the act of lending by the employer and a receipt or acceptance of a loan by the representative a violation of law; that such amendment is an indication that the making of a loan of a tugboat by the employer and the acceptance of the loan by the representative were not included as unlawful acts under the sections as they stood when the defendants were charged to have violated same."

Well, your Honor, the Court rejected the defendant's argument that the statute should be strictly construed to exclude loans and said that it should be interpreted to effectuate its purpose, which is to prevent the granting of favors by an employer to the union representative of his employees.

The Court went on to say:

> "No doubt defendants' argument urging a strict construction of the statute as typified in U.S. v. Reese, 93 U.S. 314, runs counter to the proposition that a remedial statute may not be construed "in complete disregard of the purpose of the legislature" (U.S. v. [fol. 71] Brumblett, 368 U.S. 503 at 510). No extended discussion of the statutes involved here is necessary. The Supreme Court in U.S. v. Ryan, 350 U.S. 299 and our own circuit court in U.S. v. Ryan, 232 P. 24 481 appear to construe the sections involved broadly so as to prevent the granting of favors by an employer and the receipt of same by the representative of labor. (See also Arroyo v. U.S., 955 F. 2d 349). Reversed on other grounds 359 U.S. 419."

That, your Honor, concludes my reply.

[fol. 72] The Court: Mr. Guzzetta, don't you think that there might be a distinction in the statute that talks about deliveries of moneys, or another thing of value? That is, that there might be a distinction between the delivery of money and the delivery of a tugboat?

Mr. Guzzetta: Because you have in the one instance, your Honor, a tangible thing and in another instance a loan?

The Court: Yes.

Mr. Guzzetta: No, sir. I do not feel that the distinction so made is a meritorious one.

ORAL RULING GRANTING MOTION TO DISMISS INDICTMENT

The Court: Well, that is consistent with your argument that the use of money is another thing of value, but, of course, the defendants argue to the contrary, that the intention under the old statute was that another thing of value meant something tangible and something physical.

Now, in the light of the fact that you and Mr. Nizer have raised the question as to the nature of the motion and whether it is confined to the four corners of the instrument, and I have already indicated my disagreement with you on that, I think no harm can be done if we go [fol. 73] into this question by way of a preliminary discussion because I think it is going to collaterally raise a lot of peripheral questions that are involved in this motion.

But before doing so I am going to address myself, until such time as I indicate to the contrary, to that branch of the motion which seeks a dismissal of the indictment because it fails to charge an offense. I will later on allude, I expect, to the questions of variance, the statute of limitations, venue, and vagueness, but for the time being I am addressing myself to what I consider to be the bellwether of the motion presented, i.e., whether this indictment charges an offense.

On the question of where the Court may roam in determining a motion of this nature, I think we have to go back into the procedural history a little bit, and I am not completely convinced that my approach is right. However, I have many companions in the doubt, men of eminence, so I do not feel embarrassed with the fact that I must confess that I may be wrong.

This motion, if it is to be entertained at all, must be

entertained under Rule 12 of the Federal Rules of Criminal
[fol. 74] Procedure. Now, Rule 12 provides in subdivision (a) that the pleadings in criminal proceedings under modern practice technique are now reduced to the indictment or information, the pleas of not guilty, guilty and nolo contendere.

And then comes the very troublesome sentence "All other pleas and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these Rules."

Now that would be assumed to mean that the old demurrer, the old plea in abatement, the old plea in bar, were all gone, but still the other period does still haunt us because there is the one thing that is obvious and that is in determining what we are now pleased to call a motion to dismiss, we have to go right back and discuss the demurrer, the plea in abatement, the plea in bar, and, as I will point out later, that becomes very important with respect to the jurisdiction on appeal under the Criminal Appeals Act.

In any event, subdivision (4) of Rule 12 makes provision for a hearing on a motion to dismiss.

[fol. 75] What does it say? And, incidentally, it is only a restatement of what the practice was under the old proceedings. In the case of a demurrer under the old proceedings no hearing was necessary because you would address your opposition to the face of the pleading, and where you are talking about the demurrer being brought on now under the motion to dismiss the indictment, Mr. Guzzetta, I agree with you that you address yourself only within the four corners of the document, but when we go beyond the demurrer and we get into the plea in abatement, and the plea in bar, I deferentially indicate, sir, that you have completely misconstrued the law because the Court is charged with the responsibility of holding a hearing, and that is what we are doing now, and in a moment we will address ourselves to the extent of any hearing to be held. In any event, subdivision (4) of Rule 12(b) of the Criminal Rules provides:

> "A motion before trial raising defenses or objections shall be determined before trial unless the court

orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be [fol. 76] tried by a jury if a jury trial is required under the Constitution or an Act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

So under the present modern practice bottomed upon the practice as it used to be with respect to the various pleas addressed to an indictment, or as a basis for the quashing of an indictment in those days, there has to be a hearing, and accordingly that contemplates going far beyond the four corners of the document, and, as the old cases pointed out without any question in my mind, where you have what is now in the nature of a plea in abatement, or in the nature of a plea in bar, you may and you must take extrinsic proof.

Therefore, in the light of this motion—and let me say parenthetically or go back again to subdivision (2) of Rule 12(b), which has reference to "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during [fol. 77] the pendency of the proceedings." And I believe it has been held that that even means in the Court of Appeals or the Supreme Court. I believe that sentence means that the court of its own motion, if it felt that there was a lack of jurisdiction, or the failure to charge an offense, should raise it, but I am not compelled to get to that point here because the defendants have raised it by a specific motion.

In any event, as I construe Rule 12, it would require, and I am still addressing myself to that one basis of the motion, i.e., the failure to charge an offense, a hearing to determine whether the transaction was a loan, and then upon that resolution to decide whether or not a loan was violative of the statute as it existed at the time the transaction took place. Happily, in my view of the Government's brief, I need not hold a hearing to adduce any proof because, as I have already indicated, I am convinced that the language which I read into the record from the Gov-

ernment's brief is a judicial admission that this transaction was a loan. I have no doubt in my own mind at least, that in a trial either to the court or the jury, in a preliminary hearing where the defendants have not yet subjected themselves to jeopardy, if the Government established the [fol. 78] facts which it recounted in its brief that it intended to prove, a finding by a jury to the contrary would have to be set aside, nor could the Court find to the contrary. Those facts, in my view, notwithstanding the qualifications attempted orally, and despite those qualifications and accepting those qualifications, those facts, in my view, establish that the transaction was a pure and simple loan.

Now I think this obviates the necessity of a hearing with or without a jury on the question.

We now come to the next step. Having found as I do on the Government's judicial admission that the transaction was a loan, we must then resolve whether the transaction as a loan was violative of the statute as it was at the time of the transaction, and I am of the opinion that it was not. I reject the argument that the subsequent action and the legislative history upon which that action was predicated by the Congress in 1959 in injecting into the statute the specific words dealing with a loan were intended to broaden that which I take it the Government urges was manifest before. I am, therefore, of the opinion [fol. 79] that on the extrinsic evidence offered to be introduced by the Government and its judicial admission the transaction was not an offense contemplated by the statute as it existed at the time.

Now what is the effect of the holding? Obviously the defendants have not been put in jeopardy because this is a preliminary hearing. I think it was wise that this basic question be presented for resolution before the commencement of the trial.

Under the Criminal Appeals Act, which is now found in 18 U.S. Code, Section 3731, we find that the court's intended course is exposed for consideration by two paragraphs of the Criminal Appeals Act. The first of the considerations is the second paragraph of Section 3731 of Title 18 which reads—and it speaks, of course, of those cases where an appeal may be taken from the district

court's decision directly to the Supreme Court, and it reads:

> "... from a decision or judgment setting aside or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon [fol. 80] which the indictment or information is founded."

The second area of the statute which comes into play is the fourth paragraph which provides also for direct appeal from the district court to the Supreme Court "from the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Thus the Government has now available to it, and it must act under the Criminal Appeals Act within thirty days, an opportunity when the Court rules as has been indicated, to have determined by an appeal directly to the Supreme Court either as a construction of the statute, or as the granting of a plea in bar; the validity of the Court's ruling.

I am now granting the motion of all defendants to dismiss the indictment upon the ground that it fails to charge an offense of the statute as it read at the time the transaction occurred.

In the light of that ruling I see no necessity to rule upon the remaining questions raised, to wit: variance, the effect of the statute of limitations, the question of venue, and the charge of vagueness of the statute.

The indictment accordingly, and for the reasons ascribed [fol. 81] is dismissed.

Mr. Nizer: Judge, may I ask your Honor that the defendants be discharged from bail? There is $5,000 bail, and this being a misdemeanor count, the amount of bail in all events was a very minor one, and by virtue of your Honor's ruling now made may I ask that bail be dismissed. The defendant whom I represent, Mr. Fruehauf, will at all times be available to the court as he has been in the past I can assure your Honor.

The Court: Well, Mr. Nizer, may I inquire of Government counsel whether the Government intends to prosecute an appeal.

Mr. Guzzetta: I intend to take the matter up with the Department of Justice immediately, your Honor, in whose hands the authority in such cases rests and will rest in this case, and not in mine.

The Court: Mr. Nizer, I point out that the Criminal Appeals Act contains another section which may come into play and does not at this moment, and it refers to the prosecution of an appeal such as this to the Supreme Court directly or to the Court of Appeals, in which instance the defendant would be admitted to bail on his own recogni-
[fols. 82-83] zance. In other words, the statute precludes even the matter of bail once an appeal has been taken.

Now I will go along to this extent. I will continue the bail of any defendant under bail until such time as the Government takes an appeal, and in the event that the Government does take an appeal, the defendants then may be discharged in their own recognizance under the statute.

Mr. Nizer: Thank you, your Honor.

(Hearing concluded.)

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 84] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. CR. 159-138

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 18, 1960

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order entered February 18, 1960, dismissing the indictment, which charged the defendants with violations of Section 302 of the Labor Management Relations Act, 1947, 29 U.S.C. 186.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record for transmission to the Clerk of the Supreme Court of the United States and include therein the following:

1. Transcript of docket entries.
2. Indictment.
3. The entire transcript of the proceedings on February 18, 1960 (this includes the defendants' oral motions to dismiss and the district court's oral order dismissing the indictment).
4. This notice of appeal.

[fol. 85-86] III. The following question is presented by this appeal:

Whether the payment of money by an employer (of employees in an industry affecting commerce) to a representative of his employees, intending repayment of said money with interest, is within the proscriptions of Section 302(a) and (b) of the Labor Management Relations Act, 1947, 29 U.S.C. 186, making it unlawful for an employer to pay or deliver to a representative of his employees, and for such representative to receive or accept from the employer "any money or other thing of value."

/s/ S. Hazard Gillespie, Jr., United States Attorney.

March 18, 1960.

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 87] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER AUTHORIZING TRANSMITTAL OF ORIGINAL RECORD—April 15, 1960

Upon the annexed affidavit of John A. Guzzetta, Assistant United States States Attorney, duly sworn to the 14th

day of April, 1960, and upon the Notice of Appeal of appellant, United States of America, filed herein on March 18, 1960, and upon all the papers filed and proceedings had herein.

Now, upon motion of S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, attorney for the United States of America, it is hereby

Ordered that, pursuant to United States Supreme Court Rule 12(4), the Clerk of this Court is hereby authorized and directed to transmit to the Clerk of the Supreme Court of the United States all original papers filed in the Office of the Clerk of this Court which are specified in the designation of appellant, United States of America, as contained in its Notice of Appeal; and it is further

Ordered that said records be safely kept by the Supreme Court of the United States and that they be returned [fol. 88-90] to the Clerk of this Court upon the conclusion of this appeal.

Dated: New York, N.Y., April 15, 1960.

Charles M. Metzner, U.S.D.J.

[fol. 91] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CLERK'S CERTIFICATE

I, Herbert A. Charlson, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the papers transmitted herewith, numbered 1 to 90, inclusive, comprising original filed papers, constitute the record on appeal in the above-entitled matter as designatd by the appellant, United States of America. The appellees have not filed a cross-designation, and the time within which to do so has expired.

The original filed papers are transmitted herewith in lieu of transcript of record on appeal, pursuant to the order of United States District Judge Charles M. Metzner, dated April 15, 1960.

In Testimony Hereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 18th day of April in the year of our Lord, one thousand nine hundred and sixty and of the Independence of the United States, the one hundred and eighty-fourth.

Herbert A. Charlson, Clerk, By Raoul Brugo, Deputy Clerk, U. S. District Court, Southern District of New York. [Seal.]

[fol. 92] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1960

No. 91

UNITED STATES, Appellant,

vs.

ROY FRUEHAUF et al.

Appeal from the United States District Court for the Southern District of New York

ORDER NOTING PROBABLE JURISDICTION—October 10, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.